IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,079

JEROME WILLIAMS,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLORIDA BAR #197890
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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner, :

VS. : CASE NO. 81,079

JEROME WILLIAMS, :

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RESPONDENT'S BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate. Attached hereto as an appendix are the opinions of the lower tribunal.

II SUMMARY OF THE ARGUMENT

This Court has before it three pending cases which will answer the instant certified question. The lower tribunal was correct in holding that the judge's findings here were woefully insufficient. The certified question must be answered in the negative and the decision approved.

Respondent does not agree that a recent decision of this Court is dispositive of the issue. That **case** answered the certified question in the negative, i.e., that Eutsey does not relieve the sentencing judge of his statutory duty to make findings. That case further held the error was harmless, which cannot be true in the instant case, because the only findings made by the sentencing judge in the instant case were that respondent qualified as an habitual offender, without saying how or why, or addressing any of the statutory criteria.

III ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

DOES THE HOLDING IN EUTSEY v. STATE, 383 So. 2d 219 (Fla. 1980), THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT]," EUTSEY, 383 So. 2d AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

Respondent argues that the question certified by the district court should be answered in the negative, and the opinion affirmed.

Respondent agrees with the observation made in the state's brief that the decision of this Court in the pending cases of Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), review pending no. 79.535, and Hodges v. State, 596 So. 2d 481 (Fla. 1st DCA 1992), review pending, no. 79,728, Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992) (en banc), review pending, case no. 80,751, will control the outcome of this case with respect to whether a trial court must find that the convictions relied upon as a predicate for an habitual felony offender sentence have not been pardoned or set aside. Respondent therefore adopts the arguments made by Anderson, Hodges, and Jones as his own.

Respondent does not agree with the observation made in the state's brief that the decision of this Court in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993), is dispositive of the issue. Rucker answered the certified question in the negative, i.e., that Eutsey does not relieve the sentencing judge of his statutory duty to make findings. Rucker further held the error in his case was harmless because:

> [T]he trial court expressly found that Rucker met the definition of [an] habitual felony offender by a preponderance of the evidence.

Rucker, 18 Fla. L. Weekly at S94.

It is important to note that the only findings made by the sentencing judge in the instant case were:

> He is and will be sentenced as an habitual offender (R 43).

These historical findings are woefully inadequate, and do not satisfy the requirements of Section 775.084, Florida Statutes, and this Court's prior opinion in Walker v. State, 462 So. 2d 452 (Fla. 1985), even under the harmless error standard expressed by this Court in Rucker.

IV CONCLUSION

Respondent respectfully requests that this Court answer the certified question in the negative and affirm the district court decision.

Respectfully submitted,
NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Mosley, Assistant Attorney General, by delivery to Plaza Level, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, this 16th day of February, 1993.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JEROME WILLIAMS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-01973

Opinion filed November 2, 1992.

An Appeal from the Circuit Court for Madison County.
E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

PER CURIAM.

This cause is before us on appeal from a judgment and sentence following a plea of guilty to burglary while armed, kidnapping without a firearm, robbery without a firearm, battery on a person 65 years of age or older, and attempted sexual battery. No sentence was agreed upon in exchange for appellant's plea.

In Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), this court held that absent a stipulation by the defense, the trial court must make the findings required by section 775.084(1)(a), Florida Statutes, before imposing a habitual offender sentence. The trial court's failure to make such findings in the instant case is reversible error. On remand, the trial court may sentence appellant as a habitual offender if the requisite findings are made and supported by the evidence. Anderson, supra.

In addition, the State correctly concedes that the trial court erred in sentencing appellant to a mandatory minimum term for battery on a person over the age of 65. The minimum mandatory provisions of section 784.08, Florida Statutes, only apply to aggravated batteries.

Accordingly, we affirm the judgment but reverse the sentence for proceedings consistent herewith.

BOOTH, **SHIVERS, AND WEBSTER,** JJ., **CONCUR.**

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JEROME WILLIAMS,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	)	DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 91-01973
STATE OF FLORIDA,	)	
Appellee.	)	

Opinion filed **December** 15, 1992.

An Appeal from the Circuit Court for Madison County.
E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Appe lee moves this court for certification of the same question certified in Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991). In view of our express reliance on Anderson, the motion is granted and the following question certified as one of great public importance:

> Does the holding in Eutsey v. State, 383 So. 2d 219 (Fla. 1980), that the State has no burden of proof as to whether the convictions necessary for

habitual felony offender sentencing have been pardoned or set aside, in that they are "affirmative defenses available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise as a defense that the qualifying convictions provided by the State have been pardoned *or* set aside?

BOOTH, SHIVERS, AND WEBSTER, JJ., CONCUR.